United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original - Affidavit of Mailing

74-1866

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1866

BOLIVAR IRIZARRY,

Petitioner-Appellant,

—against—

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
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Preliminary Statement

Appellant Bolivar Irizarry appeals from an order of the United States District Court for the Eastern District of New York (Costantino, *J.*), entered on May 24, 1974, denying a petition brought pursuant to Title 28, United States Code, Section 2255 wherein appellant sought to vacate his judgment of conviction for conspiracy to possess and distribute cocaine.

On January 29, 1973, appellant plead guilty to conspiracy to possess and distribute approximately four pounds of cocaine in violation of Title 21, United States Code, Section 846. Irizarry was sentenced on April 9, 1973 to eight years imprisonment and a special parole term of three years. Following his conviction, Irizarry filed several unsuccessful motions seeking a reduction in sentence. Finally, on March 13, 1974, Irizarry petitioned the District Court to set aside

the judgment of conviction pursuant to Title 28, United States Code, Section 2255. Irizarry claimed that he did not knowingly plead guilty and that the District Court failed to ascertain whether a factual basis existed before accepting the plea.

In a Memorandum and Order, dated May 24, 1974, Judge Costantino denied the petition and Irizarry now appeals.

Statement of the Case

The investigation which resulted in appellant's conviction was initiated by the arrest of co-defendant Jose Valenzuela-Correa at John F. Kennedy International Airport on October 7, 1972. Correa was arrested by Customs officials when approximately four pounds of cocaine were discovered strapped to his body during a routine Customs examination. Correa immediately decided to cooperate and a controlled delivery of the drug was planned.* The courier explained that he was acting as an intermediary between co-defendant "Mario C." (who has never been apprehended) and co-defendant Manuel Gonzales.** Under the watchful

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* On January 15, 1973, Correa plead guilty to conspiracy to possess and distribute cocaine (Count Three). Correa had been charged in all seven counts in the indictment. Prior to sentencing, Correa testified as a Government witness against co-defendant Manuel Gonzales. Correa was thereafter sentenced on March 9, 1973 to three years, to serve five months (time served).

** Gonzales was found guilty after a jury trial of conspiracy to import and the importation of the cocaine. However, his conviction was reversed by this Court because of an inadequate charge on accomplice testimony and because of certain remarks of the prosecutor during his summation. *United States* v. *Gonzales*, 488 F.2d 833 (2d Cir. 1973). The opinion of Judge Smith in *Gonzales* and the Government's brief on appeal contain more comprehensive recitations of the details of the investigation.

eye of several Customs agents, Correa was permitted to meet with co-defendant Gonzales in the latter's Bronx bar where arrangements were made for the delivery of the cocaine. At the bar, Gonzales instructed Correa to return to his motel in Yonkers where an individual would meet him the following day to receive the cocaine. That individual was appellant Bolivar Irizarry who appeared the following day at Correa's motel room. He was met there by Customs agents who arrested him moments after he had taken control of the cocaine in Correa's motel room.

Ten days later, on October 19, 1972, a seven count indictment was returned in the Eastern District of New York naming appellant and his three co-defendants, Correa, Gonzales and Mario C. The indictment charged conspiracies to import, possess and distribute the cocaine as well as the corresponding substantive offenses. Appellant himself was named in only three counts which charged a conspiracy to possess and distribute cocaine (Count Three), possession with intent to distribute cocaine (Count Six) and the distribution of cocaine (Count Seven).

One month after the return of the indictment, the only real issue arising out of appellant's involvement in the events of early October was squarely framed by appellant himself. On November 29, 1972, appellant filed an affidavit in support of a motion for discovery wherein he stated in part as follows:

> I met an individual at a bar who offered me the sum of $100 to pick up a package for him the following afternoon. Pursuant to his request I placed another package which he had given me in my car and drove to a motel in Yonkers where I was to pick up another package. I had been directed to return to the point of origin, a bar in the Bronx, and turn over both items to a third person.

> After being admitted to the motel room by a man whose full name I now know to be Jose Valenzuela-Correa, a co-defendant herein, and after having identified myself in accordance with the method told to me,* Mr. Correa told me to pick up the package. Before I could do so various men . . . burst out of the closet and placed me under arrest.

While the question of appellant's knowledge about the contents of the package was, at least initially, in doubt, Correa's knowledge of the illicit contents was not. On January 15, 1973, Correa plead guilty to conspiracy to possess and distribute cocaine.

Trial was scheduled to begin on January 29, 1973. However, on that date, appellant himself admitted his participation in the conspiracy by pleading guilty just before trial was to begin. On April 9, 1973, appellant was sentenced to eight years imprisonment and a special parole term of three years.

There then followed a series of unsuccessful motions to reduce sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure. In support of one such motion, counsel for appellant characterized appellant's role in the conspiracy in an accompanying affidavit as follows:

> [Irizarry's] role, without minimizing or diminishing its illicit nature, was at most peripheral. He was used as a conduit and his financial reward was relatively insignificant.

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* When Correa met co-defendant Gonzales in his bar the day before, he gave Gonzales the halves of two dollar bills which were cut in zig-zag fashion. When appellant appeared at Correa's motel room, he presented Correa with the same bills.

(Affidavit of Seymour Ostrow, Esq., dated July 27, 1973). Finally, on March 13, 1974, fourteen months after he plead guilty, appellant petitioned the District Court to set aside the judgment of conviction claiming that he did not knowingly plead guilty with an understanding of the charge and also that a factual basis was not established to support the plea.

In response to this petition, the Government suggested an evidentiary hearing to explore appellant's understanding of the plea. Appellant and his counsel offered vehement opposition. First, in a letter to Judge Costantino dated April 1, 1974, counsel sought to clarify appellant's position by emphasizing that "voluntariness is not in issue". Counsel contended that "the record does not contain the elements of the offense for which . . . Irizarry was convicted." Thereafter, when Judge Costantino appeared to insist on a hearing, the opposition mounted. On April 25, 1974, appellant petitioned this Court for a writ of mandamus prohibiting Judge Costantino from holding an evidentiary hearing. This petition was denied on May 23, 1974.

In the meantime, Judge Costantino had apparently concluded that an evidentiary hearing was not necessary. In a Memorandum and Order, dated May 24, 1974, Judge Costantino denied appellant's petition and observed that "[n]owhere in the record prior to the present motion was petitioner's inability to understand the proceedings brought to the Court's attention" (Appendix, A. 12). Specifically, the District Court recalled that appellant had admitted many of the essential facts in his pre-trial discovery papers and that having admitted his part in the conspiracy when he eventually plead guilty, appellant repeated his full admission as part of his motions to reduce sentence. Judge Costantino also noted that he had learned other information concerning appellant's role from co-defendant Correa who plead guilty one week prior to appellant.

ARGUMENT

Appellant knowingly plead guilty to conspiracy to possess and distribute cocaine after providing the District Court with a factual basis for the plea.

Appellant's claims that he did not understand the nature of the charge to which he plead guilty and that the District Court failed to establish a factual basis for the plea are belied by a simple reading of the transcript of the plea itself. On the day trial was to begin, counsel for appellant advised the District Court that appellant desired to plead guilty to the "conspiracy count. Count three of the indictment" (A. 16).* The Rule 11 inquiry was immediately undertaken by the District Court during which the following discussion between appellant and Judge Costantino took place:

> The Court: Now, the charge to which you are pleading guilty, under the United States Code is a charge of conspiracy.
>
> Now, you must tell this Court in your own words, what conspiracy you say you committed?
>
> Defendant Irizarry: Well, I know I was—that I was supposed to pick up at the time——
>
> The Court: What's that?
>
> Defendant Irizarry: I knew what I was going to pick up. That it was cocaine.
>
> The Court: You were going to pick up cocaine?
>
> Defendant Irizarry: Right.
>
> The Court: Of course, you can't conspire with yourself.
>
> Defendant Irizarry: No.

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* Appellant was charged in three counts of the indictment; Count Three charged the conspiracy to possess and distribute cocaine; Counts Six and Seven charged the substantive offenses of possession with intent to distribute and distribution.

The Court: In order to conspire, you have to have somebody else to conspire with. Is that true?

Defendant Irizarry: Yes.

The Court: Was there anyone else that you were working with in this agreement?

Defendant Irizarry: No. I was told by someone else to pick up that package.

The Court: You were told by someone else to pick up that package?

Defendant Irizarry: Yes.

The Court: And as a result of that conversation with someone else, you then did pick up the package?

Defendant Irizarry: I went to pick it up and I was caught before I picked it up.

The Court: What's that?

Defendant Irizarry: I was caught by the Federal agents.

The Court: You were caught. But you went with the——

Mr. Stechel: Could we first——

The Court: From whom?

Defendant Irizarry: This fellow named at the bar——

Mr. Stechel: From whom did you pick up the cocaine?

Defendant Irizzary: I went to a hotel room. The guy—Valenzuela. That's the name (A. 19-20).

In the face of this clear admission, appellant asserts incredibly that "[a]ppellant on the record denied participation in a conspiracy" (Appellant's Brief, p. 8). Appellant somehow concludes that "it seems obvious that the Court below was questioning the appellant in the belief that he was pleading guilty to conspiracy to illegally import, not conspiracy to possess and distribute" (Appellant's Brief, p. 7). Aside from the fact that appellant was not named in the importation conspiracy count, the record of the plea

shows clearly that appellant was pleading guilty to a count of the indictment charging conspiracy. Appellant stated that he was pleading to a charge involving his going to a "hotel room" at the behest of another man to pick up a "package" of cocaine. Judge Costantino explained to appellant that in pleading guilty to a charge of conspiracy, appellant was admitting to working with someone in an agreement to pick up the cocaine. Appellant clearly admitted to such an agreement. Furthermore, appellant's counsel does not explain how he could permit his client to plead guilty to a crime which he "denied" during the actual plea inquiry. Instead appellant attempts to demonstrate his lack of understanding of the charge and the Court's misunderstanding by referring to the original Judgment of Conviction which recited the offense of conspiracy to import cocaine. Appellant does not, however, mention the fact that he himself moved to correct this Judgment of Conviction as a clerical error, which motion was granted and made part of Judge Costantino's Memorandum and Order of May 24, 1974. The record of plea contains not the slightest reference to an importation conspiracy.

Finally, appellant claims that the Court did not satisfy itself that a factual basis existed to support the plea. It is well settled that *Manley* v. *United States*, 432 F.2d 1241, 1244 (2d Cir. 1970), requires that before accepting a guilty plea the District Judge "must demonstrate on the record that he had satisfied himself that there is a factual basis for the plea." The transcript of appellant's guilty plea demonstrates unequivocally that Judge Costantino complied with the direction of *Manley* by satisfying himself that Irizarry had indeed agreed to pick up the cocaine on behalf of another and to eventually deliver the illicit drug to his co-conspirator.

Appellant also claims that the *Manley* decision prohibits the District Judge from going beyond the actual plea colloquy to determine whether a factual basis exists. This argument need not be answered for the simple fact that the transcript of the plea clearly demonstrates that appellant himself provided the factual basis. However, the *Manley* decision does not support appellant's argument. Under *Manley,* the Judge may refer to any information at his disposal to establish a factual basis provided he make a record, as did Judge Costantino, that he himself is satisfied that the plea was supported by fact. *Compare North Carolina* v. *Alford,* 400 U.S. 25 (1970). See also Advisory Committee Notes, 39 F.R.D. 172.

The record clearly shows that appellant understood the charge against him and knowingly and voluntarily plead guilty to the conspiracy. His petition was properly denied.

CONCLUSION

The order of the District Court denying the petition should be affirmed.

Respectfully submitted,

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Of Counsel.

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(Rev. 1-29-71)

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 17th day of October 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a Brief for the Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Metrick & Ostrow, Esqs.
233 Broadway
NY, NY 10007

Sworn to before me this
17th day of Oct. 1974

Sylvia E. Morris

SYLVIA E. MORRIS
Notary Public, State of New York
No. 24-4503861
Qualified in Kings County
Commission Expires March 30, 1975

Deborah J. Amundsen

DEBORAH J. AMUNDSEN

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____duly entered herein on the ____ day of _____ _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,
Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

_____ Action No.____

UNITED STATES DISTRICT CO
Eastern District of New Yor

—Against—

_____
United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within __
_____is hereby admitted.
Dated: _____,

_____
Attorney for _____

FPI-LC-SM-8-73-7355